Supreme Court, U.S.
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No. 06-663

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 DISCLOSURE

Telkom has no parent company. The Public Investment Corporation Limited is the only publicly held company that owns 10% or more of Telkom's stock.

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INTRODUCTION AND SUMMARY

Telkom's petition showed that the Third Circuit (i) disregarded accepted principles of issue preclusion when it entertained relitigation of the D.C. Circuit's decision denying enforcement of an arbitration award that was under review in South African courts, and (ii) also erred by going on to hold that U.S. courts may exercise personal jurisdiction over Telkom on the view that special standards should apply in actions to enforce foreign arbitral awards. Rather than come to grips with our showing that the Third Circuit's rulings conflict with decisions of this Court and other courts of appeal, respondent Telcordia makes three arguments that do not bear scrutiny.

First, it is untrue that the issues and "parties' arguments . . . were entirely different" in the D.C. Circuit and Third Circuit. (Opp. 6). In both courts, Telcordia attacked the proceedings in the South African High Court on the same grounds and sought immediate enforcement of the arbitral award. Moreover, the Third Circuit allowed successive enforcement actions *not* because it thought that the issues were different, but because it mistakenly ruled that the D.C. Circuit's judgment of dismissal could be relitigated because it was "without prejudice."

Second, it is untrue that the recent decision of the South African Supreme Court of Appeal ("SCA") reversing the High Court's decision "removes the estoppel issue from this case." (Opp. 19.) To the contrary, if allowed to stand, the Third Circuit's erroneous ruling will spawn mischievous relitigation in other cases. It will also prejudice Telkom because, instead of dismissing the case, the Third Circuit went on to rule incorrectly on personal jurisdiction questions it should never have reached. Telcordia will doubtless rely on this ruling in the new enforcement action it intends to file. Indeed, the

unnecessary resolution of the personal jurisdiction issue echoes the same Third Circuit practice that is challenged in another pending case, *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102.

Third, it is also untrue that the Third Circuit's ruling on personal jurisdiction is merely a fact-bound determination. The court was only able to reject the emphatic rulings to the contrary of two federal district courts by applying the special and unprecedented standard that it said should be applied in arbitral award enforcement litigation.

I. Telcordia's Analysis of the Estoppel Issue Mischaracterizes the Decision Below and the Relevant Law and Facts.

Telcordia insists that the Third Circuit ruled that issue preclusion did not apply because the issue before it was "entirely different" from the issue decided by the D.C. Circuit. (Opp. 6.) This argument has no basis in the decision below or in the facts of this case. The allegedly "different" issue – whether U.S. courts should enforce the arbitral award despite the High Court's decision vacating it – was before both courts. Indeed, the Third Circuit explained that it entertained Telcordia's enforcement case because it believed (wrongly) that only a "decision on the merits [is] entitled to preclusive import" (Pet. App. 12a), not because it believed the issues in the two cases were different.

Telcordia asserts that the question whether to enforce the award despite the High Court's decision "was never briefed or argued by the parties" in the D.C. Circuit. (Opp. 14.) But in its D.C. Circuit brief, Telcordia argued that (i) the High Court improperly "reviewed the merits of the arbitration," (ii) its enforcement action should "take precedence" over the "parallel" set-aside action in South Africa, and (iii) the High Court's "order is not controlling on this Court or the District Court, which have authority

to confirm the Award as issued. *See Chromalloy*, 939 F. Supp. at 908, 914-15."[1] (Br. of Appellant, No. 03-7099, at 47-48 & n.20 (D.C. Cir. Feb. 11, 2004).) The D.C. Circuit, however, refused to remand for enforcement of the award or even further consideration, observing, parenthetically, that "the High Court issued a decision setting aside the partial award, which Telcordia says it intends to appeal." (Pet. App. 43a.) The D.C. Circuit in short, rejected the argument that the award should be enforced despite the High Court's decision. Telcordia then filed its enforcement petition in New Jersey, arguing once again that the High Court proceeding "was an impermissible appeal of the merits" and, citing *Chromalloy*, urging that "[t]he Court therefore can confirm the Award." (Mem. in Support of Telcordia's Pet. to Confirm, No. 04-CV2463, at 22-23 (D.N.J. May 26, 2004).)

Telcordia's argument also fails because the Third Circuit did not base its estoppel ruling on any supposed difference in the issues presented in the successive enforcement cases. It instead held that Telcordia was not estopped from bringing multiple enforcement actions because, in its view, decisions on non-merits issues lack preclusive effect. Telcordia contests this reading of the court's opinion (Opp. 17), but this Court need only consult the six paragraphs in the decision below that address issue preclusion. (Pet. App. 11a-13a.) The first two sketch background facts, the last two address Telkom's forum-shopping argument, and the middle two explain the reasons for the court's decision to allow successive enforcement actions. These middle two paragraphs make

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[1] Telcordia's citation to *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) is particularly significant because that case is the only United States decision ever to enforce an award after annulment in the arbitral forum.

clear that the Third Circuit mistakenly believed that a dismissal on issue preclusion grounds would prevent Telcordia from "ever bring[ing]" a future enforcement case if the award were reinstated. (*Id.* 11a-12a.) To avoid this perceived result, the court held that only a "decision on the merits [is] entitled to preclusive import." (*Id.* 12a.)[2] It is therefore no surprise that Telcordia never cites the Third Circuit's opinion in the section of its opposition contending that the court based its decision on the differences between the issues presented in the successive enforcement actions. (Opp. 11-16.)[3]

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[2] These paragraphs provide, in full:

"For Telkom to be able to piggyback a dismissal without prejudice into a dismissal with prejudice is anathema to the 'wait-and-see' raison d'être of Article VI. Although we agree with Telkom that the decision is still pending in South Africa, given the fact that the case is currently working its way through South Africa's appeals process, the fact that Telcordia prematurely brought a case for enforcement in New Jersey should not predetermine its ability to ever bring a case in New Jersey, as would be the case if the dismissal was on the merits.

Put another way, this case would be very different if, for example, the D.C. Circuit had ruled pursuant to Article V and refused to enforce the award. *Such a decision would likely constitute a decision on the merits entitled to preclusive import. That is not the case here.* The D.C. Circuit opinion relied on Article VI rather than Article V." (Pet. App. 11a-12a (emphasis added).)

[3] Citing footnote eight of the opinion below, Telcordia elsewhere states that the issue before the Third Circuit was "whether new court proceedings can be instituted 'once a set of events have passed' in a foreign parallel proceeding." (Opp. 18 (quoting Pet. App. 12a n.8).) This misleading sentence suggests that the court below adjourned because it believed that "a set of events [had] passed" that would allow for relitigation of issues decided by the D.C. Circuit. The full sentence, however, makes an entirely different point: "Here, it is undisputed that (...continued)

Telcordia's reliance on the supposed differences in the issues further ignores that a non-merits dismissal cannot be relitigated in the absence of a change in "controlling" circumstances. A party cannot evade issue preclusion by "conjur[ing] up some factual element that ha[s] changed between adjudications." *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974). The cases Telcordia cites in its opposition make clear that issue preclusion applies when "the *controlling* facts and *applicable* legal rules remain unchanged." *Comm'r v. Sunnen*, 333 U.S. 591, 599-600 (1948) (emphasis added); *see also Montana v. United States*, 440 U.S. 147, 162 (1979) (issue preclusion applies when "the factual and legal context in which the [allegedly preclusive] issues [arose] has not *materially* altered") (emphasis added). In other words, "[a]ny factual differences between the two cases" must be of at least some "legal significance." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

Telcordia offers no reason why the "factual difference" it relies on – the same South African High Court decision that it attacked in both the D.C. and Third Circuits – is "controlling" or of any "legal significance." Put another way, Telcordia has not identified an intervening factual change that would have led the D.C. Circuit not to dismiss the enforcement action.

II. The South African Supreme Court Decision Does Not "Remove the Estoppel Issue From This Case."

Telcordia next contends that the Third Circuit's allowance of successive enforcement actions should not be

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Telcordia could rebring the petition in the D.C. District Court once a set of events have passed." (Pet. App. 12a n.8.)

reviewed because the estoppel issue has been "removed . . . from this case." (Opp. 19.) This is not true. Telcordia observes that it is no longer "estopped from returning to U.S district court to enforce" its award because, after Telkom filed its petition, the SCA reversed the High Court decision vacating the award. (*Id.*) This does not support the conclusion that the harmful consequences of the Third Circuit estoppel ruling are "no longer presented by this case." (*Id.*)

The Third Circuit's erroneous decision will not only invite relitigation of dismissals without prejudice from other circuits, but will also adversely affect Telkom. If Telkom were asking this Court for an order holding that Telcordia is estopped from returning to a U.S. district court to enforce its award, then its petition might be moot because this Court could not grant Telkom the "effectual relief" it sought. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (citation and quotation marks omitted) (holding that an appeal is moot if it is "impossible for a court to grant any effectual relief whatever to a prevailing party"). But Telkom is not now seeking, nor has it ever sought, such an order. Telkom instead simply desires to defend itself in Telcordia's new anticipated confirmation action without having to contend with the Third Circuit's ruling that Telkom is subject to the personal jurisdiction of United States courts for the special purpose of an enforcement action.

This Court's power to grant this "effectual relief" is unaffected by the decision in South Africa. In fact, that decision increases the need to correct the Third Circuit's errors. Because Telcordia says it will now refile its confirmation action, Telkom must defend itself against the Third Circuit's decision to subject it to the personal jurisdiction of United States courts. (Pet. App. 7a-11a.) This adverse (and erroneous) decision would not have been reached had the court affirmed the District Court's dismissal on issue preclusion grounds.

The prejudice Telkom will suffer from the decision below belies Telcordia's assertion that this case is not "worthy of this Court's review." (Opp. 1.) Just this term, this Court granted certiorari in *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102, to review the Third Circuit's holding that a district court erred by dismissing a lawsuit on grounds of forum non conveniens without first deciding whether it had personal jurisdiction. At issue is the Third Circuit's rule that federal courts must determine their personal jurisdiction before dismissing any cases – even on non-merits grounds. *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., Ltd.*, 436 F.3d 349, 366 (3d Cir. 2006), *cert. granted*, 75 U.S.L.W. 3035 (U.S. Sept. 26, 2006) (No. 06-102).[4]

In its decision below, the Third Circuit followed this peculiar practice. Instead of simply affirming the District Court's dismissal on estoppel or adjournment grounds, the court, presumably following *Sinochem*, unnecessarily reached the personal jurisdiction question. This Court's decision to review a similar ruling in *Sinochem* weighs heavily in favor of granting certiorari in this case or in vacating the decision below if this Court reverses *Sinochem*.

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[4] The *Sinochem* court reached this decision notwithstanding this Court's holding in *Ruhrgas AG v. Marathon Oil Co.* that "a court [may] dismiss[] on . . . *non-merits grounds* such as . . . personal jurisdiction[] before finding subject-matter jurisdiction." 526 U.S. 574, 584-85 (1999) (emphasis added); *see also Penobscot Nation v. Georgia-Pacific Corp.* 254 F.3d 317, 324 (1st Cir. 2001) (district courts are not required to address jurisdictional issues when they dismiss on estoppel grounds).

III. The Third Circuit Applied An Unprecedented Standard Of Personal Jurisdiction For Foreign Arbitral Award Enforcement Actions.

Telcordia also contends that the Third Circuit's ruling that U.S. courts may exercise personal jurisdiction over Telkom in an arbitral enforcement action is "inextricably bound to the . . . facts," raising no issue worthy of this Court's attention. (Opp. 22.) To the contrary, the Third Circuit departed from settled principles when it applied an unprecedented standard for exercising personal jurisdiction in actions to enforce foreign arbitral awards and overrode the decisions of two district courts that had both ruled on undisputed facts that it would be unreasonable to exercise personal jurisdiction over Telkom.

The district courts each held that this Court's decisions clearly preclude exercising personal jurisdiction over Telkom where the parties had negotiated and signed the contract at issue in South Africa, required Telcordia to open an office there from which to perform its obligations under the contract, provided that the contract would be governed by South African law and that any disputes would be arbitrated there, submitted to the jurisdiction of South African courts, and conducted almost all of their dealings there. (Pet. App. 25a.) In addition, "key Telcordia personnel relocated to South Africa, all deliveries were made in South Africa, and Telcordia rendered its invoices to Telkom in South Africa." (*Id.* 19a). In contrast, contacts with the United States, such as visits by Telkom officials to New Jersey, were "merely incidental to the contract" and Telcordia's New Jersey headquarters. (*Id.* 27a). As the district courts found, the "contract, and the parties' performance thereof [we]re tied to South Africa in virtually all respects." (*Id.*)

To justify its departure from settled principles governing personal jurisdiction, the Third Circuit applied a new standard that focuses on the nature of the

proceeding before it, rather than the quality of the parties' contacts with the United States. Under this standard, which was premised on "the desire to have portability of arbitral awards," the court ruled that Telkom should have "'reasonably anticipated being haled into' a New Jersey court" because "the proceeding was for the enforcement of an arbitral award rather than adjudication on the merits." (*Id.* 10a.) There is no basis for Telcordia's assertion that the Third Circuit did not mean what it said. (Opp. 25-26.)

Furthermore, instead of addressing our showing that the Third Circuit's standard departs from the decisions of three other courts of appeal that have refused to adopt a special standard in arbitral enforcement actions, Telcordia makes the irrelevant argument that the facts of those cases differed in various respects that are not material to the question presented. (Opp. 27-29.) *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120 (9th Cir. 2002); *Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002); *Creighton Ltd. v. Qatar*, 181 F.3d 118 (D.C. Cir. 1999).

In ruling that U.S. courts have no personal jurisdiction over Telkom, the Third Circuit's rejection of *Creighton* was explicit. The D.C. District Court had followed *Creighton*'s holding that a foreign purchaser does not purposefully avail itself of the laws of the United States or submit itself to personal jurisdiction in U.S. court by agreeing in a contract with a U.S. vendor to arbitrate disputes abroad. (Pet. App. 36a-37a.) The Third Circuit faulted the New Jersey District Court for reaching the same conclusion, explaining that the D.C. District Court had viewed the facts "through the lens of D.C. Circuit law" rather than "through the lens of Third Circuit law." (*Id.* 9a.) In this additional respect, Telcordia's argument that the Third Circuit did not apply a conflicting personal-jurisdiction standard is untenable. Nor is there any relevance to the fact that Telkom was

privatized after Telcordia filed its D.C. District Court action. (Opp. 22 & n.7.)[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] The resolution of the personal jurisdiction issue should have been the same in New Jersey and the District of Columbia because in both cases the courts looked to Telkom's nationwide contacts with the United States. Indeed, Telcordia could have filed its initial confirmation action in New Jersey because it at all times contended that "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated" in New Jersey. 28 U.S.C. § 1391(f)(1). Instead, it filed in the District of Columbia because it wrongly guessed that the court would follow *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).